UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

STATE OF MISSOURI et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Cause No. 4:24CV-520JAR
	)	
JOSEPH R. BIDEN, JR., in his Official capacity as President Of the United States et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

JUNE 3, 2024

APPEARANCES

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JUNE 3, 2024

(The proceedings commenced at 10:00 a.m.)

THE COURT: Good morning. We are here and on the record in the case of the State of Missouri, et al., versus Joseph R. Biden, Jr., et al. It is cause number 4:24CV-520.

This case is brought by the State of Missouri and six other states, including the States of Arkansas, Florida, Georgia, North Dakota, Ohio, and Oklahoma. The action was brought on April 9th of this year 2024 against President Joseph R. Biden, Jr., the Secretary of Education, Miguel Cardona, and the United States Department of Education, challenging the Department's Rule that is titled "Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan Program."

The Final Rule was published in the Federal Register on July 10, 2023, and that Final Rule makes several amendments to the Department's policies regarding income driven repayment plans for Federal student loan programs, by among other things, creating The Savings on Valuable Education Plan, which is referred to as the SAVE Plan, to replace the revised Pay-As-You-Earn Plan, which was known as the REPAYE Plan.

The record should reflect that the States -- the State of Missouri appears by Josh Divine, and he is also lead

counsel for the other States, and also at counsel table is Reed Dempsey. I understand Mr. Dempsey is not going to be speaking; is that correct, Mr. Divine?

MR. DIVINE: That's correct, your Honor.

THE COURT: Okay. And the record should reflect the Defendants appear by counsel, Stephen Pezzi and Simon Jerome, and we also have -- and I entered an order with regard to a conference line, a phone line, to allow counsel who could not appear to listen in, and the public to listen in, if they chose to do so.

We do have a Local Rule that relates to parties listening in remotely, and so I'm going to ask the Clerk to read our Local Rule with regard to that.

(At this time, the Deputy Clerk read the Local Rule.)

THE COURT: That Local Rule is in place simply so those who are listening in remotely are treated as if they were here in the courtroom. So that's the reason for that Local Rule.

Before the Court today is the Plaintiffs' motions for stay, or in the alternative, a temporary restraining order and preliminary injunction. Defendants have filed an opposition to that. They have also filed a motion to dismiss. Those are the matters that we are going to take up here today.

In considering the oral argument today, the Court had agreed to give each side up to an hour in total to argue the issues. What I determined was the most efficient and beneficial method of dividing the time is I'm going to give each side 15 minutes to take up the issues of standing and venue.

As I understand, Mr. Jerome is going to be arguing those issues on behalf of the Defendants; and again, Mr. Divine is going to be arguing them on behalf of the Plaintiffs. At the conclusion of those arguments, I'll give each side 45 minutes in total as it relates to the other issues in this matter.

The Plaintiff has the burden of proof. So I have determined that splitting their time 40 minutes and 5 minutes for any rebuttal, and Defendants will have 45 minutes. Please don't feel like you have to use all of your time. I will be happy if you decide not to do that; but in any event, that's how we are going to split the time.

So with that, Mr. Divine, I'm going to turn this over to you to begin the arguments as it relates to standing and venue.

I see that you do have a cane there, if you want to pull up a chair.

MR. DIVINE: I think standing will be fine, thank you, your Honor. I appreciate it though.

May it please the Court, Joshua Divine, Solicitor General of Missouri, appearing on behalf of the Plaintiff States. On standing, we have presented five different theories in our briefs, but today, I want to focus on the ones pertaining to MOHELA and the Bank of North Dakota.

On MOHELA, standing is really easy, because we are asserting the same exact theory of standing that the Supreme Court adopted last year in *Biden against Nebraska*. Under that case, all we had to show is that the Final Rule will cancel MOHELA accounts, because cancelled accounts means loss of administrative servicing fees with respect to those accounts.

So far, 28,000 accounts have already been cancelled, 53,000 more are scheduled for imminent cancellation, and under the Final Rule, additional cancellations are going to occur every single month. My friend on the other side says things are different now. The Final Rule might reduce delinquencies, and that might benefit MOHELA'S other accounts. The same kinds of arguments were applicable last time with respect to their first attempt at mass cancellation.

For example, if you decreased the amount of loans by $10,000 across the board, as the Federal Government was trying to do, that also would decrease delinquencies. The U.S. Solicitor General wisely conceded to the U.S. Supreme

Court that MOHELA has standing to sue when its accounts are cancelled.

The Solicitor General simply disputed that Missouri could sue on behalf of MOHELA, but now that the Supreme Court has ruled in our favor on that issue, and now that we are back in Trial Court instead of the Supreme Courts, the Defendants have reversed course. But the Defendants were right the first time. The Supreme Court didn't do any kind of offset and benefits analysis that they are arguing for here, nor has any other courts. In fact, against our army of citations on page 17 of our brief, saying that courts don't do this sort of thing, my friend on the other side has been unable to identify even a single case of a court that has.

They considered how strange their argument would be in any other context. Think of a plaintiff who sues over an unlawful increase of taxes of a thousand dollars. Every court in America would find that that Plaintiff has standing, but my friend on the other side would say "Well, that injury is speculative, after all, those taxes might go to better roads, or better schools, or maybe Federal contracts that benefit the plaintiff's employer."

And so just at the motion to dismiss stage, we are going to have to bring in PhD economists who are going to have to take the stand and testify that the costs outweigh the benefits. No court in America requires that sort of

analysis.

So next, they try to fit this into one narrow exception recognized by the Fifth Circuit, which says that "Benefits can be considered when they are the same type and same transaction as the costs." My friend's sole arguments with respect to this case is to say that these must be of the same transaction, because they come from the same Federal regulation.

The *U.S. against Texas* case explicitly rejects that. That was a Fifth Circuit decision that was affirmed by the Supreme Court. Again, everybody recognizes that you can challenge one part of the statute even if other parts of the statute might benefit you.

Your Honor, we are worlds away from any kind of same transaction exception here. With respect to the actual MOHELA accounts that are being cancelled, it is undisputed that Missouri will not -- or MOHELA rather, will not receive those administrative servicing fees. With respect to those accounts, there is no compensation at all, much less any kind of offsetting compensation. My friend on the other side simply argues that well, maybe other accounts will be benefited, or maybe other aspects of MOHELA's business will benefit, but no court enters that kind of analysis.

But even if this Court does consider the offsetting benefits arguments -- and we don't think it should -- here

the costs way exceed the benefits. There is an old joke, your Honor, that lawyers are bad at math. That's why we went to law school. But here even under simple math, the costs here are staggering. Take the up to 2.77 million MOHELA accounts that are going to be eligible for forgiveness up to 10 years early. That's just a substantive of the portfolio. If you multiply that by the $36 per account, multiply that by the 10 years in which they will receive forgiveness, you get $987 million dollars of loss to MOHELA.

My friend on the other side quibbles with those numbers. He says "Well, the new contract that's not yet in place fully is going to pay less." But even under the lowest rate under that new contract, we are still talking about $530 million dollars. I must stress that this is a conservative estimate. I have only estimated that people who are eligible for forgiveness 10 years early, and not those who are eligible for forgiveness one to nine years early. It also doesn't including new borrowers, and it doesn't include the surcharges that are due sometimes on each account each month.

And against this, they really provide nothing. They say, for example, that maybe the delinquency rates will decrease. I find it quite telling that they are unwilling to put up actual numbers about what those delinquency rates are. And perhaps that's because right now we have historically low delinquency rates, hovering just above zero percent. And now

maybe that's an outlier. We had three years of deferments for student loans, but even if you go back to 2019, before the pandemic, the delinquency rates were about 10 percent. So even assuming the Final Rule slashed entirely all delinquency rates, and brought it down to zero, that is a drop in the bucket compared to the 42 percent of loans that are going to be forgiven early under this Rule.

Here, all we have to show is a single dollar of harm, likelihood of a single dollar of harm, and you can be SBA list case. We have shown that a hundred million times over.

Now, I do want to talk about this $1.5 million dollar accounts that they discuss in their brief, and really that's just a red herring. The document that they attached 29-1 shows that all of those accounts are PSLF accounts. Those are Public Service Loan Forgiveness accounts. These are accounts that aren't really affected by the Final Rule, because they already get forgiveness at 10 years. These are also accounts that were already slated to be transferred by the end of this June, and MOHELA essentially asks for them to be transferred early to save some administrative costs.

So all of that is supposed to occur by the end of June. Well, what's going to happen in July? Well, they are going to cancel tens of thousands of more accounts. They are going do the same thing in August, end of September, and

every month from here on out.

The Bank of North Dakota, your Honor, is also clearly injured. The bank refinances Federal loans. It earns about a million dollars a year doing so. And the reason I say that to you is because the Federal Government does not set individualized interest rates. They set it across the board. And so the bank is able to come in, and they are able to say "Well, you, I can see that you are low credit risk. So I am going to give you a more competitive interest rate than the Federal Government is." And the Bank of North Dakota has done that about 16,000 times.

The harm here is that there is no reason for anybody to refinance with the Bank of North Dakota anymore after this Final Rule. Why would you refinance with the Bank of North Dakota, which requires actual repayments of your loans. And so the Federal Government, which is going to on average require you to pay back only 61 cents on the dollar. You don't have to be an economist to understand that free money is appealing.

Now, my friend's arguments against this is essentially to argue for Government exceptionalism. They say the competitor standing doctrine, which is well-established, they say that that shouldn't apply when the Government is the Defendant here.

Well, that doesn't make any sense, because the

Government -- well, I'm sorry, the competitor standing doctrine, every case under that doctrine involves the Government entering the market. Sometimes they do so to subsidize other private actors. Sometimes they do so more directly as a market participant themselves, which makes sense, because the *Snapp* case -- the *Alfred L. Snapp* case that we cite from the Supreme Court, expressly recognizes the ability of the Government to enter the market as a market participant on equal-standing with all other market participants.

Now, the cite of the Sixth Circuit case that came about just two weeks ago called *Mackinac Center*. That case has no applicability with respect to the Bank of North Dakota for one clear reason, and that's this, and I want to quote, that the Sixth Circuit faulted for the Plaintiffs for -- and I quote "Plaintiffs have not established the markets in which they or their competitors operate."

Here everybody knows what market we are talking about. We are talking about the market for student loans, the market for refinancing loans, things of that nature.

Now, I do hope to save just a couple minutes of time for rebuttal on standing, if the Court will allow us. So I'll go ahead and get to venue real quickly. Section 1391(e) says that "We, the State of Missouri, may sue where ever we, the State of Missouri, reside." Now, they say that

somehow Missouri does not reside everywhere in the State of Missouri; but for 130 years, courts have unanimously rejected that argument. Their whole argument depends on their assertion that this other section in the venue, or this other provision in the venue section, which considers where a business resides, they say that's essentially a catchall section, and so it must include plaintiffs as well -- or it must include states as well.

That provision does not even purport to be exhaustive or purport to be a catchall. It is the second provision in a list of three, which is a very odd place to find any catchall provision. The venue statute simply doesn't define where a state resides, and that's because when Congress passed the venue statutes in the 1940's, there were five decades of precedents of courts saying "A state resides everywhere within the states borders."

And in any event, at page 15 of the reply brief, my friend says what this Court should really do is assess the relevant activities of Defendants in Missouri. Well, those activities are canceling tens of thousands of accounts from MOHELA, and MOHELA is here in the St. Louis suburbs. It is in the Eastern District, and so venue was appropriate twice over. Your Honor, I would like to reserve the remaining --

THE COURT: For whatever it is worth, for better or for worse, I did not set aside time for you for rebuttal on

the standing and venue issues.

MR. DIVINE: Okay.

THE COURT: So you have kind of anticipated some of the arguments that are going to be made by the Defendant.

MR. DIVINE: That's fair. I'll make one more standing argument then.

THE COURT: Go ahead.

MR. DIVINE: An additional second reason why MOHELA has standing here is that recall that MOHELA doesn't just process loans. It also owns loans, about $874 million dollars worth of these legacy loans that were issued up until 2010. And it earns interest on those loans, $51 million dollars last year.

The harm here is that the Final Rule expressly urges and encourages people to refinance their MOHELA owned loans into Federal Government owned loans, so that they can take advantage of this Final Rule. When it happens, MOHELA loses a stream of interest income, which is an Article III injury.

Now, my friend on the other side says "Well, people refinance for all kinds of reasons, not just the Final Rule." And that's true, but we need only show a substantial risk that even one person will consolidate because of this Rule. That is what the *Department of Commerce* case in effect holds, and that's easy to show here. Again, this Rule promises that

the average borrower pay back only 61 cents on the dollar, and in January -- January is when my friend on the other side, when the Defendants first announced this policy. They first announced that they were going to start canceling loans under this Rule. MOHELA immediately received a spike in consolidations -- between December, before the announcement was made, to February, the number of consolidations more than tripled.

We didn't see numbers like that -- we haven't seen numbers like that until back in 2022, when Defendants announced their first cancellation policy. In fact, the consolidations decreased in December 2022 immediately after the Eighth Circuit enjoined the previous first attempt at mass cancellation, and the Supreme Court declined to vacate that injunction pending appeal.

The idea that none of these consolidations are because of the Final Rule just doesn't hold any water at all. Thank you, your Honor.

THE COURT: Okay. Thank you, Mr. Divine. Mr. Jerome, you may proceed.

MR. JEROME: Thank you, your Honor. Good morning, my name is Simon Jerome on behalf of the Department of Justice. I'm here representing the Federal Defendants alongside with my cocounsel.

Your Honor, I'll dive right in with MOHELA. The

elephant in the room, of course, is *Biden vs. Nebraska*. I would say for that case, it was not pressed, as Mr. Divine conceded. It was not pressed at before the Supreme Court the issues related to offsetting benefits, or in his words, offsetting benefits. The primary focus of contention in that case was whether MOHELA was an instrumentality of Missouri, and thus, was a properly injured entity to furnish standing on Missouri's behalf.

I would say to you, your Honor, Plaintiffs make much of this doctrine of what they call offsetting benefits. I will say it is not -- that doctrine doesn't appear in Supreme Court case law. It doesn't appear in Eighth Circuit case law. And the notion I think is a common sense one. Our argument is that MOHELA cannot plausibly claim to be injured by circumstances that in fact financially benefit it.

So leading right off then, I'll note that the same figure that Mr. Divine made reference to, which is MOHELA's request to have 1.5 million accounts removed from its portfolio. 1.5 million is quite a bit large, about 18 times larger, than the 81 thousand accounts slated for forgiveness under the SAVE Plan in the immediate future.

Mr. Divine mentioned that, in his view, all of the accounts are the PSLF accounts. While certainly a large number of them is, in fact, you will see -- I believe it is line 26 of that chart -- that those accounts are referenced

by PSLF and non-PSLF. Line 26, I believe it is, mentions that 300 thousand accounts that are not PSLF are slated for removal. I would also add that I don't totally understand the -- I don't concede that the idea that some accounts are PSLF and some are not. It is relevant to this inquiry.

In fact, your Honor, if what MOHELA is saying to the Department of Education, and the letters we have attached with our briefs, make this point, if they are saying they can't service this number of accounts for whatever reason, they can't plausibly claim to be injured by the removal of those accounts. And so if there were some way of saying that what was going to be removed was more than 1.5 million, we might be in the world where we are talking about all of the other offsetting benefits, but I would just say, you know, at the get-go, I think it is material that MOHELA has asked to have those accounts removed.

THE COURT: Counsel, let me ask you, even though those accounts may be asked to -- MOHELA may be asking to remove those accounts, it doesn't mean they are necessarily wanting to remove 28,000 more accounts that have been cancelled under this Rule.

MR. JEROME: Yes, your Honor, I take that point, and I think the proposed contract modification that has been signed after we had submitted it along side a rely brief, demonstrates that the Department of Education and MOHELA are

engaged in ongoing conversations about the precise number. The Department, to be precise, has committed to removing up to 1.5 million accounts from MOHELA's portfolio.

In other words, you Honor, I would submit that there is room to right-size the number removed. If MOHELA doesn't want to be injured, or one would think if removal of accounts injured it, there is room within these negotiations to arrive at the right number that doesn't exceed what MOHELA is looking for, and I think certainly when we are talking about 50,000 here, or 20,000 there, we are nowhere near 1.5 million, your Honor.

I would add quickly that as the Department itself observed in the Final Rule, there are predicted benefits to servicers beyond just -- beyond just to borrowers under the proposed Rule. There will be reduced servicing costs. The Department anticipates that delinquencies and defaults will drop. There are all sorts of benefits for servicers, as we have outlined in our brief, that will presumably come to pass, and that at least should be accounted for in the standing inquiry.

I would add, your Honor, we drew attention in the briefing to the $7.2 million dollar penalty the Department recently assessed against MOHELA. In the briefing on the other side, we read quite a bit about why that penalty was assessed. Ultimately, your Honor, that's immaterial. The

point is that MOHELA took actions that led to a 7.2 million dollar error penalty being assessed against it. So the idea is with fewer accounts, as they have requested, that will give them the opportunity to be back on their feet.

THE COURT: Aren't all of these potential benefits that you are talking about, aren't they all speculative?

MR. JEROME: Your Honor, I would say that we can't predict with certainly that they will come to pass. The Department, on the basis of a lot of data, anticipates that they will, and I think that that estimation deserves some credence, although I'll add I think my impression -- our impression -- reading the briefs from the other side is that Plaintiffs have lost sight of whose burden it is to establish standing. The point simply is that given all of the uncertainty, there is significant reason to doubt that financial harm will come to pass to MOHELA.

Your Honor, I think, you know, I'll just say quickly, because I know time is limited, that the figures that the Plaintiffs rely on, $987 million dollars, is very impressive, but there are a number of problems with that number, with that figure, with the math underlying it. Not least is that it relies on a contract pricing that's going to expire very soon. We think that adds further reason to doubt the math.

Turning to the purported consolidations of FFEL

loans, to distinguish -- just to make sure we are on the same page -- there is the category of loans that MOHELA earns money for servicing directly, and then there is those that it earns interest on, because it owns the assets outright. Looking at the same chart that the Plaintiff submitted, MOHELA's numbers are all over the map. They would trace the certain increases in consolidation figures to the announcement of -- announcements made by the Department of Education.

I'd submit, your Honor, that shows no more than correlation at best. You know, the reality remains borrowers make difficult decisions about their finances -- sometimes to an outsider irrational decisions about their finances. I'm not saying that's the norm, but the point is a lot of factors go into making a decision about whether to consolidate or whether or not to. And so to suppose that those consolidations are related to this Rule, they need to be caused by the operation of the Rule. I think the Plaintiffs' evidence falls well-short of showing that sort of direct connection.

In addition to just the idea of consolidations happening, the Plaintiffs need to show that consolidations will harm MOHELA, which they have not done. Borrowers under FFELA loans default like any other borrower. This purported guaranteed interest income is not guaranteed after all.

There are a lot of reasons to suspect that holding is uncertain -- this financial instrument with uncertain future returns will, in fact, not be as beneficial as receiving the face value and accrued interest of the loan and reinvesting that funding elsewhere.

So again, I think there is -- we are harking into a pretty common sense principle, your Honor, which is that MOHELA, if it stands to benefit, cannot complain to be injured, and there are so many unknowns about what's going to happen that there is good reason to think it might end up slightly ahead.

Turning to the Bank of North Dakota, your Honor, make its symphony of themes, which is the theme of speculation. I'll add, as we noted in our opening brief, that even the Bank of North Dakota on its website appears not to consider itself a competitor with the Federal Government. It seems to consider itself a subsidiary actor. But I'd say beyond that, you know, there is a quote that I'll take from Mr. Divine that I think is indicative of the logic that he is relying on, which is that free money is appealing.

Sure. Perhaps. But I would add, you know, I'm disputing the premise that free money is necessarily a guarantee. The idea that it is -- that it is the sole dispositive criteria in an individual deciding whether to refinance, or whether to take out loans from a different

entity, is just not supportable.

The *Mackinac Center* case I would submit it is squarely on point. Whatever the Court said about the plaintiffs in that case failing to identify an analogues marketplace, the Court also noted at the end of the opinion that the plaintiffs had not come forward with concrete evidence about why an individual -- any individual who said that they were going to take the action complained of.

I think the same can be said here. For all of Bank of North Dakota's borrowers, I haven't seen a single affidavit, haven't seen a single statement from a borrower saying "You know what, I'm going to consolidate because this plan is coming into effect." And on that point, your Honor, it bears mentioning how long the public has been on notice of this Rule. Presumably, given that stretch of time in North Dakota, the Plaintiffs could have found at least one plaintiff who said "I'm going to consolidate." They haven't done so.

That underscores, I think, that individuals may consolidate and might not. They might refinance. They might take out loans from the Bank of North Dakota. They might not. Just as in *Mackinac Center* though, that evidence is not in the record.

Finally, your Honor, with reference to the motion of venue, I think the statute speaks for itself. There is a

specific provision, Section 1391(e), that specifies where a suit may be brought when an officer or an employee of the Federal Government is the defendant. One of those options is where the plaintiff resides. That's the venue provision that the Plaintiffs themselves have invoked. And in turn, the residency section of the statute, my friend on the other side says that it doesn't define where a state lives, and that it gives a catchall. It doesn't do such thing. It gives three options, your Honor.

We generally presume when Congress has set out a scheme for how things will work, even if the wording seems slightly odd, you pick the best option, your Honor. You pick the one that makes the most sense. And what my friend left out, is that the first option is for a natural person, and the third option is for a nonresident foreign plaintiff. Missouri is not contestedly neither of those things. The only thing it can be -- it is not a business. My friend said the second provision refers to a business. It says "An entity with the capacity to sue and be sued."

Respectfully, your Honor, that's the best fit out of those three. So the statute pretty clearly requires that the suit be dismissed, and it may be refiled in the Western District of Missouri or one of the other venue locations available to the Plaintiffs.

THE COURT: Just so that we are clear, you agree

that if the Court were to find that MOHELA suffers injury, and therefore, the State of Missouri has standing, that the case goes forward. The other states can go forward with the lawsuit; is that correct -- along with Missouri?

MR. JEROME: Your Honor, I would take issue with two aspects of that. To the extent MOHELA is relevant in the venue inquiry, I think it is not actually. The statute makes no provision --

THE COURT: I'm not talking about the venue issue. I'm just talking about standing.

MR. JEROME: I'm sorry, your Honor. No, your Honor, it would be our position that if one plaintiff -- every plaintiff to survive a motion to dismiss needs to show standing. The Court, in *TransUnion*, said "standing is not dispensed in gross."

I will tell you, your Honor, there are cases, of course, from Appellate Courts saying "one plaintiff is enough." Our interpretation or reading of those cases, and we think the best reading, in light of the standing, is not "dispensed in gross" idea, is that for an Appellate Court, with its subject matter jurisdiction and appellate jurisdiction, to reach the merits of a controversy, at least one Plaintiff has to have standing.

But at this juncture, your Honor, we'd submit all of the Plaintiffs need to have proof of standing or else be

dismissed. Thank you, your Honor.

THE COURT: Okay. Thank you very much. With that, Mr. Divine, you can approach the podium, and we will pivot to the other issues in this matter.

MR. DIVINE: Your Honor, during my presentation, I would like to give the Court some statutory excerpts that I intend to reference during that time. I also have a copy for opposing counsel, if that's okay with the Court.

THE COURT: That's fine. If you are going to read from those statutory excerpts, you need to read slowly so that the court reporter can get them down.

MR. DIVINE: Absolutely.

THE COURT: Thank you.

MR. DIVINE: Permission to approach the bench.

THE COURT: You may.

MR. DIVINE: May it please the Court, it is often said that Congress does not put elephants into mouse holes, but forget the one elephant, into this mouse hole, the Secretary tries to fit a whole circus. Congress provided that the length of the repayment plans relevant here is not to exceed 25 years. And from that rather unassuming text about length, the Secretary asserts unlimited discretion to cancel every penny of every student loan.

But as the Supreme Court has long held, extraordinary assertions of power like this one require

extraordinarily clear language from Congress, and this "not to exceed" language just doesn't cut it.

Your Honor, the major questions doctrine is the most straightforward path to success for the Plaintiff States. Under that doctrine -- or that doctrine is triggered when two elements are present: The agency action has substantial economic significance, and the agency action has substantial political significance. When those two elements are triggered, the agency must identify exceedingly clear language authorizing its actions. Here there is no dispute that these two elements are present.

The Supreme Court last year applied the major questions doctrine, and found that the first attempt at mass cancellation involved these two elements, and this Rule involves the same exact topic; and in fact, it is a little bit more expensive than the last mass cancellation attempt.

It is also clear that my friend on the other side does not dispute the lack text that explicitly authorizes forgiveness. Instead, they tried to draw an implicit inference of forgiveness authority from this "not to exceed" language.

But the major questions doctrine requires that the text be explicit. You cannot rely on an implicit inference. So right off the bat, they fail under the major questions doctrine. Their attempt to rely on implicit inferences is

necessarily fatal under that doctrine.

Your Honor, I think their response is telling. They don't dispute any of the things I have just said. Instead, what they try to say is that, in fact, the major questions doctrine involves three elements needed to trigger, not two. They take their two elements that we have described, and they say a third one is required, that the Rule be unprecedented.

But the Supreme Court has rejected that. I'll read for you the Rule statement from the *Alabama Association of Realtors* case. There the Supreme Court said, and I quote "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." That's at page 764 of that opinion. There is no mention at all in that Rule statement about the necessity about a rule or a regulation be unprecedented. *Biden against Nebraska* last year, page 2374 of the that opinion, same thing.

But in any event, even if the Court finds that three elements are required, the Final Rule is unprecedented. The previous three rule makings, and there have only been three under the ICR program, have all been much more modest than this one. The first one, back in the early 1990's, authorized forgiveness of just parts of loans for that one percent of borrowers. And then the second and third simply

brought the ICR program into line with the IBR program.

There is a good reason that none of these were challenged, your Honor. They are all very very modest. But never before has a Secretary asserted an interpretation of the statute that would permit him to cancel every penny of every student loan. Never before has a Secretary asserted authority to cancel $500 billion dollars worth of loans. Well, I take that back, I guess there has been one instance, and the Supreme Court rejected it last year. And never before has a Secretary used the ICR Program to render the later passed IBR program entirely superfluous. This regulation is unprecedented by any measure of definition.

Your Honor, even setting aside the major questions doctrine, the Final Rule fails on the basic text, and I want to give the Court four reasons for that. Number one, the statute simply authorizes no forgiveness at all, which puts this statute into sharp contrast with the later-passed IBR Program, the later-passed Public Service Loan Forgiveness Program, and the earlier-passed Teacher Loan Forgiveness Program.

Your Honor, I would like to defer the Court to my excerpts that I have provided. Tab one, this is the ICR authority. If the Court flips to page two, paragraph D, this is the section directing the Secretary to create the ICR Plan, the Income Contingent Repayment Plan. And it says that

borrowers shall repay over a time period, and I quote "not to exceed 25 years." So this text is the linchpin that my friend on the other side relies on. This is the peg that they hang their hat on.

But plainly nothing about this unassuming text authorizes forgiveness at all. And I think we do have to remember that the Standard Repayment Plan is 10 years. And so all of this is saying is, well, the Secretary can let you stretch out your payment beyond 10 years, and the Secretary can let you stretch it out up until 25 years. But you do need to repay, and we are not going to let the Secretary stretch it out to 50 years or a 100 years. There is nothing in this about forgiveness at all.

THE COURT: Let me just ask you, so what is your view of the interpretation, what happens at 25 years?

MR. DIVINE: So I think what the Secretary must do is they must create ratios and formulas so that you do pay within 25 years.

THE COURT: So what happens when you get to 25 years?

MR. DIVINE: So if at 25 years, you haven't paid, and the Secretary has, in fact, created these ratios so that you would pay within 25 years, then it is the same thing that would happen if you didn't pay under the Standard Repayment Plan. You would go into default, and once you go into

default, you come out of the plan. So if you are -- let's just take the standard repayment plan. You are nine and a half years in, and you decided, you know, for whatever reason maybe economic difficulty, maybe you just decided you are fed up with the system, you decide to stop paying. So you've got six months left.

Well, now you are outside the 10 year period where you have defaulted, so you are no longer in the Standard Repayment Plan. You are outside the plan in default, and the acceleration clause comes in, and you are required to pay that. So the same thing under 25 year plan.

THE COURT: So again, your position would be -- your interpretation would be that at 25 years, anybody who has a balance, they go into default.

MR. DIVINE: No. My interpretation is that the Secretary must create the ratios so that you pay within those 25 years.

Now, the Secretary hasn't done that until -- has not done that before now, and I would think that the -- the borrowers would have very strong equitable defenses against the Secretary if the Secretary tried to require repayments from those individuals who did not fully repay because of the fault of the Secretary.

What the Secretary must do is actually change the ratios, so that you pay -- repay within 25 years. And I'd

like to refer the Court to tab two, which is going to provide more textural support for this. So tab two, is the -- it is Section 1078, is the direct Stafford Loan. It is just a one page handout. This section is expressly incorporated into the ICR program. When the ICR references repayment plans, it incorporates this specific section. And this specific section includes the same exact "not to exceed" language.

So if you look at paragraph 9A, Roman numeral (I), this is the standard plan that we were just talking about. It says you repay the same amounts month after month until you are done. It says that the Secretary shall create the Standard Plan, and the Secretary shall create it so that it is -- and I quote "not to exceed 10 years."

My friend on the other side, on page 43 of their brief, they expressly admit that the Standard Plan does not include authority to forgive. So even though the Standard Plan includes the exact same "not to exceed" language, as in the ICR authority, they admit that there is no language here authorizing them to forgive the Standard Plan Loans, even though it is the exact same language.

If the Court looks at the next several Roman Numerals, there is the Graduated Repayment Program "not to exceed 10 years." There is the Income Sensitive Repayment Program "not to exceed 10 years." There is the Extended Repayment Program "not to exceed 25 years." Defendants have

no theory why this exact same language here does not create authority to forgive, but somehow Congress puts it over in the ICR program, and then it magically takes on new meaning.

And the reason they don't have any theory for that, is because there is a Cardinal Rule that when Congress takes a similar text from one statute to the other, as Congress is doing here, the old text -- or when Congress brings the old soil with it, it retains the same meaning it had in the first statute. So if this doesn't authorize forgiveness here, and the Secretary admits it doesn't, then it necessarily cannot authorize forgiveness in the ICR Program.

The second reason, your Honor, why the Final Rule fails on the text, is because the text expressly requires repayment. I refer to tab one. Again, this is the ICR Program again, on page one, paragraph D-1, it says that "The Secretary shall offer a borrower of a loan made under this part a variety of plans for repayment of such loan including principal and interest." And then on the next page, tab one, page two, paragraph E-5 discusses the balance due. It says "The balance due under the Repayment Plan shall equal the principal and interest."

Your Honor, the ordinary meaning of "repay" is well, repay it, it means paying back what you borrowed. We cite dictionaries to this effect. We cite case law to this effect, but the Final Rule violates this ordinary meaning.

The Final Rule expressly calls for zero dollar checks. Your Honor, that's not even partial repayments. It is no repayments at all. If I try to send a zero dollar check to my mortgage lender, they'd foreclose. The bank knows what repay means. I know what repay means, and Congress did too, which is why when Congress wants to authorize forgiveness, it does so expressly, because it knows that this repay language by itself requires actual repayments.

THE COURT: Let me just ask you, with regard to the Public Service Loan Forgiveness Program, that program is also referred to as a Repayment Plan for public service employees; and in fact, it is a forgiveness program.

MR. DIVINE: Yes, and in fact, you have to repay, unless you satisfy the elements needed -- the elements to obtain forgiveness. In fact, a lot of people who are under the Public Service Loan Forgiveness Program do repay, because maybe they work for eight years in the program, and then they decide to leave the program. But the point here is that Congress created a Repayment Program. You must repay until we tell you that you are authorized to forgive.

So Public Service Loan Forgiveness, they must repay until they satisfy 10 years of public service. The same thing with the IBR authority.

The third reason texturally why the Final Rule fails, it is because it converts what is supposed to be a

loan program into a grant program. The Final Rule requires that the average borrower pay back 61 cents on the dollar, and essentially no interest, that's for undergrads. If you include graduates, it rises slightly, but only to 71 cents on the dollar for all borrowers, undergraduates, and new graduates. In fact, a clear majority of individuals who are currently on the plan are paying back zero dollars. They are paying back nothing at all.

And you don't, in fact, start to pay back the full principal under a loan until you are making more than 80 percent of Americans. And even after that, your interest is still being subsidized up until about the 98th percentile for income. We are talking about, you know, first year, second year, Ivy League graduate associates who are at fancy New York law firms who are being subsidized under this Rule.

In fact, this Rule provides twice as much free money as the Pell Grant Program. And of course, the Pell Grant Program is the centerpiece grants program under the Higher Education Act. So when you have this program that is a grant for almost everybody, it is no longer a loan program, and the Secretary has violated their authority to create loan repayment programs rather than grant programs.

The fourth reason on the text, your Honor, why this Final Rule fails, is that because it renders the IBR Program superfluous. Recall back in 1993, Congress creates the ICR

Program, and then later on in 2007, Congress creates the IBR Program, which is intended to replace ICR with respect to individuals who fall below a certain income-to-debt threshold. So ICR for everybody else, but if your income-to-debt threshold is here and far below that, now you get IBR. And IBR is the only forgiveness plan, based on income, that expressly authorizes forgiveness. It is the only one.

This plan was the product of years of negotiation. It took until 2007 for Congress to pass this plan, and then three years later, President Obama at his State of the Union address, expressly called for Congress to take action to make the IBR Program more generous. Congress heeded that call and did so. But under the Final Rule, the Final Rule throws all of that away.

On page 46 of their brief, my friend on the other side is unable to identify even a single reason why anybody would choose the IBR Program anymore. The ICR Program is more generous with respect to everybody. In other words, when Congress spends years passing this IBR Program, it took -- you know, they did the legislative log, and the committee hearings, and the all of that, and when they heeded President Obama's request to make it more generous, all of that was for naught. Although back in 1993, the Secretary could have just done this with the stroke of a pen.

Courts do not lightly interpret texts to render other provisions, especially in the same act, superfluous. So this Court should not interpret the ICR authority to be so broad that renders the IBR Program entirely superfluous.

On the arbitrary and capriciousness issue, your Honor, we raised eight claims. I don't want to discuss all eight of those. I'm going to discuss only the first one, which will be the most egregious. And that is there is no dispute that the cost estimate here is grossly inaccurate. It underestimates the true cost of this Rule by at least $300 billion dollars, and it does so on the knowingly false assumption that the Supreme Court would uphold their position in the *Biden against Nebraska* case, even though the Supreme Court had already decided that case against them before this Rule was published.

Now, their arguments is that the Secretary signed this Rule two weeks before the Supreme Court issued its decision. But there is no dispute that you can edit a rule all of the way up until publication. And in fact, the Secretary said to the public that he did not finalize this Rule until June 30th, after the Supreme Court had issued its decision. So he may or may not have signed it two weeks before that, but he expressly said he did not finalize it until after the Supreme Court's decision.

There is a basic rule of Administrative Law going

all of the way back to *Chenery* that he can't reverse that course now. He can't -- they can't engage in post hoc rationalizations, and say actually, it was finalized two weeks before, even on June 30, 2023, he said it was finalized on that day.

THE COURT: Where is the requirement that they do the cost benefit analysis. Where is that found?

MR. DIVINE: So we are not claiming violation of the Higher Education Act, but the *FCC against Prometheus* case says that if you do a kind of an analysis -- even if you are not required to do it by any kind of substantive law -- the APA requires that agency action be both reasonable and reasonably explained. So the Higher Education Act doesn't require this cost benefit analysis, but if they are going to do it, they must do it in a reasonable way. And they did that analysis. They said that the President directed them to do that analysis, and so they are required to do it in a reasonable way.

Here, it was, you know, regardless of the timing, whether it was final on June 14th, whether it was final on June 30th, it doesn't matter. It was arbitrary and capricious for them not even to consider the possibility that the Supreme Court would rule against them. I think we have to recall that when this Rule was proposed, January 2023, before that, two months before that, the Eighth Circuit had

already enjoined the Rule.

Then the U.S. Solicitor General writ up to the Supreme Court and asked the Supreme Court "please vacate this injunction pending appeal." This is now December 2022. The Supreme Court declines that request.

So during the entirety of this rulemaking process, the Rule was enjoined, and the Supreme Court, having already refused to vacate that injunction, had kind of -- well, it had shown the direction it was leaning. And so it was entirely arbitrary not even to consider the likely possibility that the Supreme Court would rule against them in that case.

And the real reason, your Honor, for all of this haste, and the real reason that they decided not to go back to the drawing board and do this again, is well, the President has been very clear that the purpose of this Final Rule is to evade the *Biden against Nebraska* decision. He said that two weeks ago at his Morehouse Commencement address. He said "When the Supreme Court told me I couldn't" -- and he is talking about canceling loans -- "When the Supreme Court told me I couldn't, I found two other ways to do it." He is talking about this Rule.

In February, when the Department announced the first mass cancellation under this Rule, the President said, and I quote, "The Supreme Court blocked it" -- talking about

the first attempt -- "The Supreme Court blocked it. They blocked it, but that didn't stop me." Your Honor, a desire to evade a Supreme Court ruling is not justification to do a rushed botched job that underestimates the cost of the Rule by $300 billion dollars.

So then my friend says "Well, this is all harmless error. We are totally indifferent to the cost. We would have done this even if we knew it was going to cost $300 billion more." Well, your Honor, that makes things worse. The GDP of the entire State of Missouri is $300 billion dollars. The idea that you wouldn't even consider changing the Rule at all because of a $300 billion dollar increase in their cost is mind boggling, and if anything, it shows an unalterably closed mind with respect to this Rule.

So my friend is stuck between a rock and a hard place. They have to pick their poison. Either the cost estimate was deliberately false, in which case it is arbitrary and capricious, or they have an unalterably closed mind, in which case it also fails.

Unless the Court has questions about this, I'll move into the irreparable harm issue. With respect to the status quo, I think both sides agree that the purpose of this proceeding here is to maintain the status quo. They are the ones who are trying to disrupt it. They have said, as we have explained in our briefing, in their own words, they say

that they are trying to "transform loan repayments." They are trying to "transform and disrupt an entire current system that exists." The status quo right now is that there are millions of accounts that have not yet been cancelled, and they are trying to cancel them. Preserving the status quo means blocking them from doing that until the final judgment on the merits.

They also argue that we took too long to sue, and that argument is foreclosed squarely by Eighth Circuit precedent. The *NG against The Board of Regents* -- that's *NG against Board of Regents* case, says that "The delay is only significant if harm has already occurred." Here we are seeking prospective relief. We are trying to stop future cancellations. Section 705 authorizes this Court to pause the Rule going forward. And so the delay argument simply doesn't matter when what we are doing is seeking purely prospective relief with respect to these motions before the Court today.

THE COURT: Let me just ask you, on page 42 of your brief, you have "Vacating the early implementation would reinstate the status quo." So that suggests that you are trying to vacate all of the early implementation.

MR. DIVINE: No, your Honor. If this Court vacated early implementation, for example, from what are we June 3rd up until July 1st when this is supposed to go into effect,

that's what we are talking about right now. So the early implementation is we are still in the period of early implementation up until the Final Rule is triggered to go into effect in July. So we may have been imprecise in our briefing, but that's what we are trying to convey to the Court there.

THE COURT: So again, for all of those people who there has been early implementation, they have signed up for the SAVE Program. They have been processed under the SAVE Program. What are you suggesting that the Court should do with those people?

MR. DIVINE: Nothing at this stage, we are seeking prospective relief only. So it is not going to disrupt -- we are not asking the Court to disrupt anything that's already occurred with respect to those individuals. At the preliminary injunction stage, we are simply asking the Court to prevent them from continuing to implement this Rule with respect to additional -- with respect to additional accounts.

THE COURT: Okay.

MR. DIVINE: On vacatur, so here we are talking about a Section 705 pause rather than the Section 706 vacate, but for all purposes and respects, they are essentially the same thing, just one at the PI stage, one at the final judgment stage. But the problem my friend on the other side runs into, is they conflate equity with statutory remedies.

Now the Eighth Circuit has said, in the APA context, you do the standard four factor test that you find in the equity context. But once we satisfy that, we get not only equitable relief, but we also get statutory relief. And here, the statutory relief, Section 705, says it operates on the Rule in its entirety, not just with respect to the Plaintiffs, as you would have in an equitable situation. But with respect to the Rule, with respect to the Defendants, it operates against the entire Rule. That is the well-settled -- that's well-settled authority.

My friend on the other side cites a concurrence by Justice Gorsuch, who wants to -- and basically questioning whether the Southern authority is correct, but until the Supreme Court "square T's" that up, and decides to reverse that, that has been the long-standing doctrine for at least 30 years, as even Justice Gorsuch recognized.

THE COURT: So your position would be that the Court couldn't sever certain portions of the Rule and keep in tact other portions of the Rule; is that correct?

MR. DIVINE: The D.C. Circuit has recognized an exception. They say it's an exception to the default rule of in the PI stage, pause the entire thing, or at the final judgment stage, vacate the entire thing. I don't think they have satisfied the -- the stringent standard for the exception.

So, for example, we are primarily challenging the ability to forgive. If they lose that ability, then it is unclear whether -- they haven't identified anything in the Final Rule that stays with respect to, for example, the payment thresholds. They would have to revise the payment thresholds, because those payment thresholds are not high enough that somebody would actually repay within 25 years.

Now, there are some other provisions like do you count a spouse's income if you are filing, you know, married filing separately, and there are some ancillary tangential things that we haven't discussed, and I don't think we take a position with respect to those. With respect to forgiveness, with respect to the payment thresholds, with respect to forgiving the interest, I don't think any of those can stand.

I'd also add that on the vacatur issue, last time we were litigating against Defendants on this issue, they expressly stipulated that these statutory remedies were appropriate. So after we prevailed in the Supreme Court, once we went back to the Eastern District of Missouri, the stipulated to the judge on that case that these statutory remedies, Section 706 vacatur, was appropriate in that case.

Your Honor, I just want to very briefly touch on the -- touch on the question whether the President is a proper party. There is a good reason that there are a lot of cases called *State against Biden*, or *State against Trump*, or

whoever the next president will be, there will be more of those cases, that is because in *Clinton against New York*, the Supreme Court expresses -- well, my friend on the other side is correct, that injunctive relief generally is unavailable against the President. We don't dispute that. There are exceptions, of course.

But *Clinton against New York* expressly distinguishes between declaratory relief and injunctive relief. And in that Supreme Court case, over Justice Scalia's objection, the Supreme Court determined that declaratory relief was appropriate against the President.

We can seek that here, and because the question of whether injunctive relief against the President is going to be a very fact-specific inquiry that is, in large part, going to depend on whether the President is going to decide to continue doing this anyway, even if there is order relief against the Secretary. It is simply premature to dismiss him at this stage.

If the Court has no questions, I'll yield until rebuttal.

THE COURT: I want you to go back and talk about the timing of the filing of this case. Before the Secretary moved forward with this Rule, there were negotiated ruling making committees.

MR. DIVINE: That's correct.

THE COURT: I think that the State of Missouri participated in those.

MR. DIVINE: That's correct.

THE COURT: And then withdrew?

MR. DIVINE: That's right.

THE COURT: And the Final Rule was actually published in July of 2023. There was language in the Final Rule that talked about the fact that the Secretary was going to move forward with early implementation. There were several provisions that were specifically designated for early implementation on July 30th of 2023, and yet this lawsuit wasn't filed until April of 2024.

So I am curious as to the timing, and how it relates to your claim that there is imminent and permanent harm to the Plaintiffs.

MR. DIVINE: Yeah, a couple of things, your Honor. Number one, I'll restate what I said about the *NG against Board of Regents* case. Again, we are not seeking any retrospective relief. We are not asking the Court to disrupt anything that has already occurred. We are seeking only prospective relief.

And so the Eighth Circuit, they are squarely-held that when you are seeking prospective relief -- sorry -- when you are speaking prospective relief only, you are seeking relief for accounts that have not yet been cancelled but are

going to be cancelled, and that's going to happen every month from here on out. Then the arguments about delay are just totally irrelevant.

Now, with respect to the early forgiveness here, in the Final Rule, there is mention that some aspects might be designated for early implementation. But the actual forgiveness, the first time that is designated is in January. And, of course, it is in a half page in the Federal Register. I can't speak for other attorneys. I don't read the Federal Register every day. And so, we didn't actually learn about this until it was publically -- very publically announced in February.

Now, with respect to the negotiated Rule making, the *Texas Children's Hospital* case that we cite says that when you are pursuing non-litigation remedies, as we were doing by participating in the negotiated Rule making sessions, when you are doing that, any kind of a delay cannot be held against you. So that runs until December. And then we don't find out about this in January, because we don't read the Federal Register every day. We find out about this in late February. And between late February and when we sued, it is about a little bit over a month.

Of course, we had to learn all about the industry, bring everything together, bring seven different Attorney General's Offices together, which I think anybody who has

worked in the AG's Office knows it is a monumental undertaking just to get everybody on the same page. And so that's what we ran into there, and that is -- if it is delay at all, and I don't think it is, then it is much shorter than periods of the Eighth Circuit has permitted to proceed.

THE COURT: Okay.

MR. DEVINE: Thank you.

THE COURT: All right, thank you very much, Mr. Divine. Mr. Pezzi, you may proceed whenever you are ready. Thank you.

MR. PEZZI: Good morning, your Honor. Stephen Pezzi from the Department of Justice on behalf of the United States.

I would like to start with the plain text of the statute. And, in fact, for conveniences sake, I will use the printout that Mr. Divine provided both to myself and to your Honor.

I think it is telling the selections of this printout that Mr. Divine has chosen to highlight, as well as the selections that he has chosen not to highlight.

And, so first, I would like to refer your Honor to 20 U.S.C. -- and this is on page two of three in tab one. So the second page of the handout, 20 U.S.C. 1087(e)(d)(1)(a)(D), highlighted on this page is a statute that provides for the creation of quote "An Income Contingent

Repayment Plan" and then the highlights stop "With varying annual repayment amounts based on the income of the borrower." And then the highlights continue "Paid over an extended period of time prescribed by the Secretary not to exceed 25 years."

Defendants' position in this case relies on the entirety of that phrase, not just the selections that Mr. Divine has highlighted, and Defendants' interpretation is consistent with an unbroken bipartisan precedent at the Department of Education since this statute was first enacted in 1993. Every Secretary of Education, and since this statute was enacted in 1993, has advanced the interpretation we are here defending today, and it relies on the entirety of that provision.

Why I emphasize the piece that was not highlighted by Mr. Divine, is because there is a clear contrast between that language, and language at the back of Mr. Divine's handout. This is now on tab two, page one of one is the fourth page of the four page handout that your Honor has. Mr. Divine makes reference to the alternatives for a standard repayment plan, and a graduated repayment plan; but again, the language for a standard repayment plan, language that is not highlighted, calls for quote "A fixed annual repayment amount paid over a fixed period of time."

And so Mr. Divine's interpretation of the Income

Contingent Repayment Plan authority that the Secretary of Education has does not account for that distinct statutory language.

Your Honor asked, I think correctly, the question of what is supposed to happen after 25 years, and I think today we got our first clear answer to that question from Plaintiffs. Mr. Divine's answer is that Plaintiffs are -- that the borrowers are simply supposed to default.

I would submit to your Honor that the distinctions in this language between fixed annual payment amounts, and amounts that vary in relation to the income of the borrower, suggests that Congress was doing something intentionally by describing those plans in different ways. Again, that is consistent with the unbroken bipartisan consensus at the Department of Education.

Mr. Divine discussed some of that history, and I think his primary response as to why those three agency precedents for this plan somehow differ from the plan before the Court today, ultimately boil down to some version of the total dollar amount at stake in this plan is higher than it was in those prior plans, and we don't dispute that indisputable factual difference, although the biggest explanation for the increased dollar amount really turns on the size of the Federal student loan market which has grown massively in the last 10 to 15 years. The total amount of

Federal student loan debt used to be, you know, just fractions of what it is today for a variety of reasons, many which have nothing to do with the Department of Education, not anything to do with increased college attendance in this country, and increased tuition costs.

But it is, regardless, narrow legal principle to say that the Secretary of Education has the authority to implement cheap or medium-sized plans, but does not have the authority to implement expensive plans. Congress, of course, could have designed the statute that way, or could have exercised its appropriations power to place those sorts of limits on the Secretary's authority, hasn't done so here. Notably, Congress has done so in other sections of the Higher Education Act, and so we cite in our brief several examples throughout the statute where Congress took pains to say that "This sort of actions the Secretary can take must be cost-neutral."

And again, there is no such provision here. So I think Plaintiffs' inferences from other statutory language, which I will get to in a moment, I think are inconsistent with that feature of Plaintiffs' argument.

Mr. Divine spent a great deal of time in his brief, and some time at the podium today, talking about authority that is not before the Court, and that is the authority to create Income Based Repayment Plans or IBR Plans. Those are

different plans, subject to different statutory authority, different statutory restrictions, different statutory criteria, and I think Mr. Divine's primary argument is that the Secretary's action today has rendered the IBR Plan superfluous, and he draws an inference from that that Congress wouldn't have permitted such a generous ICR Plan that would render the IBR Plan superfluous.

Even taking that argument on its own terms, which I think there are some problems with, which I hope to get to in a moment, it is simply inaccurate to say that the IBR Plan has been rendered superfluous by the SAVE Plan. The -- no doubt, the SAVE Plan is quite generous to many borrowers. It was designed to be, and most borrowers will find the SAVE Plan the most advantageous available option. Again, that was the point.

It is not correct that all borrowers will find that to be the case. This is discussed in the Federal Register in the Final Rule at 88 Fed Reg 43888, and it talks at length about the tradeoffs that certain borrowers will face between the benefits of the SAVE Plan, and some of the different benefits provided by IBR Plans. These are especially pronounced for graduate student borrowers, and so while I do not dispute that a majority of borrowers will likely prefer the SAVE Plan to the IBR Plan, and they very well should, it is not correct that the IBR Plan is off the books, or is

rendered superfluous, and anyone who reads the Federal Register will see that explanation at length.

THE COURT: Other than some graduate students, who else would be benefited by the IBR Plan in light of the changes that are made now to the Income Contingent Repayment Plan under the SAVE provisions. So who else is going to be benefited. Who else would choose to do that?

MR. PEZZI: So I think in particular, those with high, high discretionary incomes are more likely to be interested in the IBR Plan just the way the payment calculations work. The other difference is that the IBR Plans retain a specific payment cap. So the highest possible monthly payment under IBR Plans is capped, and that is not true of the SAVE Plan.

Again, we don't dispute, especially for undergraduate borrowers, that the vast majority will prefer the SAVE Plan, but there no -- that's again, even setting aside graduate borrowers, there is no statutory prohibition on making one plan more generous than the other. In fact, by definition, either the ICR option or the IBR option is going to be more generous than the other.

In this case, the Secretary has designed the latest modifications to the Income Contingent Repayment Plan authority to be more generous for most borrowers, but there is no reason to think that that causes any legal problem.

Now, stepping back a moment -- even setting aside that I think important factual correction about the nature of these plans, what Mr. Divine really wants the Court to infer is that in 2007, when Congress enacted the IBR authority, that it somehow was implicitly rejecting the interpretation that the Secretary was advancing then, and that the Secretary is advancing today, that loan forgiveness at the end of the extended repayment period is possible also on the ICR Plan, and there is just no reason to think that that inference applies here.

Justice Thomas' opinion in the *Marx* case, M-A-R-X, talks about how the Supreme Court is careful to -- well, avoids over reading Congressional actions of this very sort under the *expressio unius* canon that Mr. Divine relies on, and the question is whether, in context, is there any reason to think that that's actually what Congress was doing, and here there is not.

And, so again, I think under Mr. Divine's theory what happened is that, although the Secretary of Education was allowing for loan forgiveness under Income Contingent Repayment Plans since 1993, despite Congress apparently not wanting that outcome, its reaction was in 2007, to provide additional loan forgiveness authority to the Secretary of Education, both in terms of IBR Plans, and the Public Service Loan Forgiveness provision, without any amendment at all to

the Income Contingent Repayment Plan authority that, according to Mr. Divine, the Secretary had been incorrectly reading the -- through that entire period, and there is just no reason to draw that illogical inference about Congressional alterations to separate statutory authority that is otherwise irrelevant to the Court's task here today.

The major questions doctrine and *Biden vs. Nebraska* is obviously discussed at some length in the briefs. I thought it was telling and interesting that Mr. Divine started today with an argument that there is no requirement for application of the major questions doctrine. That an agency action be unprecedented. We have a relatively small dataset for when the major questions doctrine is triggered, of course, but in all of the cases that I have read, and I think all of the cases cited in the parties' briefs, so *West Virginia vs. EPA*, *Alabama Association of Relators vs. HHS*, *Biden vs. Nebraska*, obviously, and the OSHA vaccine mandate case.

In all of those cases, there is extensive discussion by the Supreme Court of the unprecedented nature of the agency action in question being quite meaningful to the Supreme Court's analysis of the statutory interpretation questions that were before the Court in those cases. And so I think it is absolutely relevant to the question of whether this plan can survive scrutiny under the major questions

doctrine, that not only is it not unprecedented, I mean, this is an amendment to an existing plan, the REPAYE Plan, that has been in effect for roughly a decade, and it reflects, again, an unbroken bipartisan consensus by every Secretary of Education since this statute was first enacted. So I think that is a very significant difference with all of the recent Major Questions Precedents from the Supreme Court that I do not think this Court should overlook lightly.

Biden vs. Nebraska is obviously the most closely analogous case to this one in that it involves student loans, but the similarities really stop there. Again, I have already discussed the most significant difference about prior agency precedent. The statutory text there was also quite different. So there, the Supreme Court was particularly troubled by language by the word "modify." And so a key part of the Department's unsuccessful argument in that case was that it had a modification power that allowed it to implement that prior loan forgiveness plan, and the Chief Justice's opinion for the Court talks about how modification is a word that is about incremental minor changes, and that, you know, whatever one might say about that prior plan, it was certainly a very significant departure from some of the prior invocations of the Heroes Act authority that the Department relied on in that case, which again, is not the authority at issue here. So that issue is, of course, not at all

applicable to this particular plan.

THE COURT: But again, the authority that you are relying upon is that language "not to exceed 25 years." That's the language that you are relying upon in terms of giving the Secretary authority to forgive loans; is that right?

MR. PEZZI: So it is not just that language, your Honor. So, I mean, certainly the "not to exceed 25 years" limitation we think is consistent with our theory, and then some significant tension with Mr. Divine's theory, for the reasons I have already addressed. But again, what Congress was doing was creating a different type of plan that differed from the standard, and extended, and graduated plans, with fixed payment amounts over a fixed period of time, that I already pointed your Honor to the statutory language on that subject.

In devising a plan that could extend as far out as 25 years, the Secretary not only can, but must, per Congress' direction, vary the annual repayment amounts based on the income of the borrower. And so if -- I think under Mr. Divine's interpretation, it is very hard to see what the Secretary of Education was supposed to make of that language, and I think the "not to exceed 25 years" is certainly part of the picture, but the Supreme Court has always been clear that the entire statutory text is appropriately considered, and we

think that that other statutory language, taken as a whole, not only authorizes this plan, but provides clear Congressional authorization for this plan to the extent that is necessary under the major questions doctrine.

I will say there is -- Mr. Divine didn't say much about this today, but much of the brief is about absence of limiting principles. We have engaged on that issue to some extent in the briefs, and I don't want to tread over that ground again too much here today. I will just say, again, it is a long and dense read. It is an 80 page rule in the Federal Register, but if you read the rule, you will see extensive discussion of limiting principles, and a variety of instances, in which commenters suggested that the plan be more generous in a variety of ways, and the Secretary of Education repeatedly had to explain to commenters that there were limits to the powers of their -- to their authority under the statute that could not be transgressed set by Congress.

And because the Secretary respected those limits, and I'm happy to talk about some specific ones, if necessary, I mean, nobody has sued over them, because we plainly complied with them. So, you know, there are -- the key statutory provision that we have been talking about it actually goes on to talk about, you know, how these sorts of plans are not available to what the Department calls

"parent-plus borrowers," and the details of who a "parent-plus borrower" is, for example, it is not particularly relevant to this litigation, that's because the Department respected those limits in the statute, and there is several other examples as well.

Unless your Honor has more questions about the statute, I'll move on to the arbitrary and capricious issue.

THE COURT: Go ahead.

MR. PEZZI: So we have several arguments there. I mean, the most -- perhaps the most formalist purely legal threshold argument I think is an important one to focus on, because I think it could relieve your Honor's burden of getting into the weeds on some of these cost questions.

I think it is quite well-settled in a lot of circuits, and certainly in the D.C. Circuit, and the Sixth Circuit, which are the cases we cited in the brief, as well as some others, that a cost benefit analysis that was conducted, not because the statute required it, but instead because the President required it via Executive Order 12866, is not subject to judicial review. That is, again, black letter law in at least the D.C. Circuit and the Sixth Circuit.

And Mr. Divine's response to that point I think was to say that "Well, we are not seeking to enforce the Executive Order. We are seeking to enforce the APA, the

Administrative Procedure Act." That argument, of course, would apply in every single case in which this issue comes up. It is a principle that only really applies in the context of the Administrative Procedure Act, and so I'm hard-pressed to see how that could be an exception to the general rule. That would mean that the general rule doesn't exist.

And so, although I recognize it, I don't have Eighth Circuit authority as clear as some of the D.C. Circuit authority, for example, we have cited. I would recommend, your Honor, to Judge Silberman's opinion on the *Air Transport Association* case. That rejects this exact argument, and says quite sensibly that if you were allowed to enforce the Executive Order simply by saying your cost benefit analysis was arbitrary and capricious under the Administrative Procedure Act, that would be a sea change in the law as to how courts review these sorts of cost benefit analyses.

So, I don't think the argument gets off the ground for that reason alone. Of course, I mean, if we were going to analyze the question, it really boils down to an argument that the Department entirely failed to consider an important aspect of the problem. That's the Supreme Court language in the *State Farm* case originally, and that the Eighth Circuit, and other Courts of Appeals have used over and over again. It is simply not true that the agency entirely failed to

consider the question of cost.

They again, they did a cost benefit analysis that Mr. Divine thinks was incorrect, but they also specifically rejected the suggestion from some commenters that they prepare a second cost benefit analysis. Essentially, this sort of cost benefit analysis that Mr. Divine now says they should have prepared here, that would account for the possibility that they, you know, turned into the reality that the Supreme Court would rule against the Government on the prior loan forgiveness plan.

The agency explained in the Final Rule that it wasn't going to do that, and that was not an irrational decision. Again, in light of the principles we were just discussing, since there was no legal obligation to conduct one cost benefit analysis, there certainly was not a legal obligation to conduct two cost benefit analyses.

The Eighth Circuit's March 2024 opinion in *Mandan M-A-N-D-A-N*, 95 F. 4th 573, which we cite in our brief. The Eighth Circuit "Declines to adopt the novel position that an agency must explain not evaluating a nonrelevant factor" -- which is a rational decision -- and I think, you know, there are some differences with that case too, to be clear, but that principle, I think, controls. The agency did not have an obligation to engage in a lengthy explanation of cost or a variety of different cost and benefits scenarios. The Higher

Education Act, unlike some other Federal statutes, simply doesn't require that, and so this Rule cannot be held arbitrary and capricious because of a mistake in a cost benefit analysis.

Our last argument on that point is a harmless error argument, and I think that argument too is quite well-grounded in Supreme Court precedent and the text of the APA. So I mean the APA explicitly -- it is not a judgment doctrine. The APA explicitly says that a reviewing court shall take account of the rule of prejudicial error, and here we can be unusually confident that the agency was quite comfortable with incurring significant costs to create this sort of plan.

Really, the error that Mr. Divine is talking about, is failing to attribute costs that the agency expected to be associated with the Heroes Act Debt Relief Plan; and in fact, they turn out that they will be associated with the SAVE Plan, because the Heroes Act Debt Relief Plan was enjoined, and so there is more outstanding student loan debt that may now be subject to the SAVE Plan, than would be the case if the Heroes Act Debt Relief Plan had gone into effect. Obviously, in either case, the Department of Education was comfortable with incurring that significant cost, and there is no reason at all to think that if they had reprinted the cost benefit analysis to move the cost from column A to

column B, that somehow that would have caused a change in the agency's approach.

Mr. Divine's primary response to that is to invoke a closed-mindedness doctrine, which when I went to law school, and when Mr. Divine went to law school, was an administrative law doctrine that allowed for judicial review of the question of whether the agency had an impermissibly closed mind in its rulemaking process. That is no longer the law, and so the *Little Sisters of the Poor* decision, another Justice Thomas opinion from the Supreme Court in 2021, just says quite clearly "Like the procedures that we have held invalid, the open-mindedness test violates the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." That's 140 S. Ct. 2367 at page 2385. We cite the case in our brief as well.

So there simply is no closed-mindedness doctrine anymore, and Mr. Divine's cases on that point all predate the *Little Sisters of the Poor* decision. Unsurprisingly, I think it would be quite challenging to find one afterwards, and I don't think it would be possible to find one afterwards that's consistent with Supreme Court precedent.

So I think even if your Honor were troubled by that cost benefit analysis, or were to conclude that it was reviewable and violated the APA, it is Plaintiffs' burden to

show prejudice, and I don't think they can do so here.

I'll just speak very briefly about Plaintiffs have been noticed in comment argument. They think the agency should have had a longer comment period. Again, the Supreme Court opinion in *Vermont Jankee*, which we have talked about at some length in our brief, that those same precedent that Justice Thomas was referring to in the *Little Sisters of the Poor* from the passage that I just read your Honor, prohibits courts from establishing arbitrary limitations on agency authority beyond what the text of the APA itself provides, and we think that principle controls here, which is why courts have not been frequently blessed common periods of 30 days, 45 days, and 60 days. This is a matter for the agency's discretion. The agency absolutely could have, and maybe Mr. Divine thinks they should have, offered a longer comment period.

My understanding is sometimes the Department of Education does 60 day comment periods. Sometimes they do 30 day comment periods. Here they did a 30 day comment period. There is no reason to think that that's unlawful whether or not it was best practices from Mr. Divine's prospective.

On irreparable harm and delay, I think your Honor is correct to focus on that question. It is beyond doubt that the Eighth Circuit takes very seriously the idea that an extensive delay in seeking preliminary injunctive relief

undermines an assertion of irreparable harm.

We have cited three, or four, or maybe even five Eighth Circuit cases on this issue in our brief, and Plaintiffs focus very intently on one of them. The *NG* case, N-G, I apologize if I'm pronouncing that incorrectly, but I mean, I think Plaintiffs significantly over read what that case says, especially in the context of the broader Eighth Circuit precedent on the question of delay. But even if we were just going to accept the idea that this doctrine is only applicable in a context in which the Plaintiff has not suffered the harm yet, that test it plainly satisfied here, and I don't understand Mr. Divine's argument to the contrary. His brief is shot through with references to what he considers to be the allegedly unlawful early implementation of the Department.

We learned, I think for the first time today, that the relief they are requesting from the Court does not extend at all to any of that early implementation authority, which is candidly news to us, and of course, we are happy to hear it, but if that's a way out of this delay doctrine, I mean, that argument could be made three years from now. I mean, they could sue three years from now and say "Sure, you know, billions of dollars in debt has already been discharged, but we are only seeking relief for the remaining three billion dollars" -- you know, "remaining billion dollars." And I

think it is quite hard to imagine that the Eighth Circuit Panels who wrote those three, or four, or five opinions about delay would think that that was an appropriate way to seek a preliminary injunction.

Mr. Divine tried to rely on the fact that he does not read the Federal Register. Candidly, I think that argument is just completely inconsistent with the notion of judicial review under the APA. There is a reason agencies put these things in the Federal Register, and the purpose is to provide public notice of the very things that Mr. Divine claims he was not on notice of.

As your Honor noted, Missouri itself was an active participant in the negotiated rulemaking proceedings on this Rule, until it withdrew prematurely. But the idea that Missouri should be excused for failing to continue to keep an eye on what they now claim is this incredibly significant unprecedented agency action, I think any timing issue is a problem of their own making, as your Honor I think correctly recognized in the context of the scheduling dispute that was before this Court.

I will also say, and feel free if I'm approaching my time, your Honor, feel free to let me know. I don't have a watch for better or worse, but I'm --

THE COURT: You have a few more minutes.

MR. PEZZI: That's I think should be all I need,

unless your Honor has any more questions.

The early implementation is quite significant here. I think Mr. Divine's argument might have more appeal, if what we are talking about were some ancillary technical provisions that aren't core to the litigation. That is not the sort of provisions that have been early implemented here. So, I mean, dating back to July 2023 itself, the provision changing from 150 percent to 225 percent of the Federal poverty line is the amount for discretionary income to be accounted for. That provision was earlier implemented in the Final Rule itself.

The January or February Federal Register activity was about the -- what I think Mr. Divine would think is the most significant provision of the entire Rule, which is about a shortened path to forgiveness for certain low balance borrowers, and so that provision is in effect as we speak, and has been in effect for several months, including before the lawsuit.

And, you know, the only remaining provision that I think Mr. Divine thinks is, you know, a significant provision at issue in this case is about reducing to a five percent of that outstanding discretionary income, the amount of a monthly payment from a higher threshold. But I mean, of the three biggest provisions of the Rule that I think, you know, in a colloquial sense at least, are already in effect, and I

think that's quite significant under the equitable factors that your Honor has to consider in the context of a preliminary injunction.

THE COURT: In the Final Rule, the Secretary references that borrowers who earn 150 percent of the poverty line are statistically indistinguishable from borrowers who earn 225 percent of the poverty line. What -- explain that to me, if you can.

MR. PEZZI: Yes, your Honor. It is a very good question. So I do not think what the Secretary of Education meant by that was that there were no differences between someone making 100 percent of the poverty line and 225 percent. They are obviously some differences. They were statistically indistinguishable in the context of the particular dataset that the Secretary was analyzing on that question, which is self-reported material hardship.

Essentially, in response to like a survey, for example, someone could be asked whether you have suffered material financial hardship, and the two criteria that I think the Secretary was looking at most closely were food and security. I think it was the big one. But basically the question is like "Do you struggle paying your bills?" That's my paraphrase of it, to be clear, rather than an actual quote. But on that question, they looked at the statistical data, and they didn't see statistically significant

differences in that dataset until 225 percent of the Federal poverty line. Plaintiffs have no basis to question that, and I think given the standard review under the APA, there would be no basis to do so here. So that was not meant as like a categorical statement that someone making "X" income or "X-plus" $20,000 a year are indistinguishable in all respects.

The last thing I will say, unless your Honor has questions about any of the matters I have discussed so far, is just on the scope of the relief question, I won't belabor it. We have cited a lot of cases in our brief that candidly we cited in almost every case we litigate these days, especially against State Attorney General's Office, about traditional equitable on Article III limits on the judicial power, and why relief should be tailored to the parties before the Court, who can establish standing, and an actual injury, rather than nationwide injunctive relief that has admittedly become more common in recent years.

I think that papers suggested that this is somehow a settled issue that the Supreme Court has already resolved. That is plainly not the case. There is a reason I think Mr. Divine's briefs talk about oral argument transcripts, and what Justice Kavanaugh said at a recent argument in a case that didn't end up addressing the question. So we recognize that there is not some clear Eighth Circuit or Supreme Court

precedent that resolves that question in our favor either, but I think the same could be true of Mr. Divine's position, and we think the general principles announced in the cases cited in our brief suggest that, you know, were the Court to issue any sort of relief, it should be limited to the provisions of the Rule, if any, that the Court concluded were unlawful, and they were actually causing some real injury to a particular Plaintiff.

THE COURT: So, again, in that regard, if the Court found that loan forgiveness was beyond the authority of the Secretary, and struck down the provisions that relate to, or enjoined the provisions as it relates to loan forgiveness, what would be left of the Rule -- what are you suggesting the relief would be?

MR. PEZZI: So, obviously, we hope that your Honor doesn't reach that conclusion, but if your Honor would --

THE COURT: I understand that.

MR. PEZZI: -- everything else in the Rule would be left, and I think the Federal Register itself makes that quite clear, but even just the passages we quote in our brief, but there are even more in the Federal Register itself. The Secretary made quite clear the intent that to the extent any provisions were found unlawful, that the rest of the Rule would go into effect, and under the D.C. Circuit precedent that we cite in our brief, and I agree with Mr.

Devine, that there is not clear Eighth Circuit precedent on this question, the only other question then for the Court is whether the Rule could function sensibly without the stricken provisions. And again, the agency explained at length why that -- why it could, and there is no basis to question any of those reasonable conclusions here.

So the last thing I will say very quickly, unless your Honor has questions, is that I think it is clear from Mr. Divine's presentation today, even more clearly from the briefs, that to rule in favor of Missouri, or the other Plaintiffs in this case, the Court would not only have to conclude that the SAVE Plan was unlawful, or it would have to effectively conclude that every single Income Contingent Repayment Plan ever issued by the Secretary of Education dating back to 1993, under Presidents of both parties, was unlawful in the very same way. We think that's a big ask. We don't think it is justified by Mr. Divine's papers. We would ask the Court to deny Plaintiffs' motions for injunctive relief.

THE COURT: Okay. Thank you very much, Mr. Pezzi. Mr. Divine, you have five minutes. Thank you.

MR. DIVINE: Thank you, your Honor. I'll try to be as brief as possible. On the major questions doctrine, it is not correct that every single rule that has been struck down under that doctrine has been unprecedented. It is correct

that the first time the issue -- the Rule has been regulated, it has always been unprecedented. By definition, the first time you do anything, it is unprecedented.

In the *Alabama Association of Relators* case, for example, you had an eviction moratorium. It wasn't the first eviction moratorium. I believe there was a third, a fourth, and maybe even a fifth one that had been instituted. And, in fact, the previous one that that decision was issued in I believe in September of 2021, and the previous eviction moratorium had expired at the end of June, or early July, and theme of present, had imposed another warning. That later eviction moratorium was the one that the Supreme Court struck down under the major questions doctrine.

On the issue of whether their Final Rule makes the IBR Program obsolete, the benchmark here is not the specific way in which they had used the authority here. The benchmark is the authority that they have asserted, and their regulation asserts authority to cancel every single loan, every single penny of every student loan. So they have decided to only do $500 billion dollars here, but they have expressly asserted authority to cancel everything.

So the idea that anybody would use IBR, you know, when the ICR authority let's you forgive everything, it just makes a mockery of the entire process between 2007 and 2010 when Congress spent a ton of time legislating on this issue.

With respect to the ICR text, so I understand the briefs only discuss the "not to exceed 25 years." My friend on the other side has said "Well, there is this fixed period of time language." Well, that simply recognizes -- I mean, that's inherent in any kind of program that is based on your income. The period of time has to be fixed under the standard repayment plan, because it is a standard repayment plan for everybody. But when it is going to be based on your income, of course the period of time is going to be different. If you have a higher income, maybe you are going to pay it off in 15 years. If you have a lower income, maybe it going to be 25. That doesn't create any authority to forgive.

In fact, I'll skip over that issue. On the irreparable harm issue, I believe it is a *Texas Children's Hospital* case. It might be a different one, but it says that things -- that delay is measured from the time when the State or the Plaintiff first learns of the issue. And for us, that was February. Again, under the *NG* case, the *NG* case is very clear that when you are seeking prospective relief, delay just simply doesn't matter at all.

Your Honor, unless you have any questions, I would like to just briefly conclude.

THE COURT: Go ahead.

MR. DIVINE: The Defendants have asserted authority

to redistribute $500 billion dollars from teachers, farmers, nurses, and truckers, to people who haven't paid off their student loan, their student loans yet, all based on this "not-to-exceed" language. But Congress simply did not give the President or the Secretary authority to make this massive monumental policy leap. But because the President has done so, it has frozen the legislative sphere. After all, why do the hard work of writing legislation, holding committee hearings, talking to constituents, and taking difficult votes, if the Secretary can do everything that day with a flick of a pen.

Your Honor, in the injunction here, it is not just pro-rule of law, it is pro-democracy. Thank you.

THE COURT: I want to thank all of you for being here and presenting the arguments that you had. You have briefed many of these issues. The briefs I think are very very well-done and helpful to the Court.

In terms of reaching a decision, and issuing an order, I know looking at my schedule, and my calendar, I can tell you it is going to be a couple of weeks before I get an order out. I understand the time-sensitive nature of all of the issues, and that a full implementation is July 1st. So I'm certainly aware of the time-sensitive nature of this.

I will work to try to get you an order quickly, but I know again, just looking at my schedule, and all of that,

it is going to be a couple of weeks, but I do expect to get you an order in that kind of timeframe.

Again, I want to thank you for being here today, and I appreciate all of that, and we will be in temporary recess. Thank you very much.

(The proceedings commenced at 11:39 a.m.)

REPORTER'S CERTIFICATE

I, Lisa M. Paczkowski, Registered Professional Reporter, do hereby certify that I am a duly appointed Official Court Reporter for the United States District Court, Eastern District of Missouri, and that the foregoing is a true and accurate reproduction of requested proceedings had in the matter of:

State of Missouri, et al vs. Biden, et al.

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Dated this 16th day of July, 2024.

/s/ Lisa M. Paczkowski
Lisa M. Paczkowski
Official Court Reporter
United States District Court
Eastern District of Missouri